STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL and KATHY BEEMAN,

Plaintiffs-Appellants,

v

COVENANT HEALTH CARE-COOPER and GERARDO REYES, MD,

Defendants,

and

PRAKASH MALKANI, M.D.,

Defendant-Appellee

UNPUBLISHED
December 19, 2006

No. 261978
Saginaw Circuit Court

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs Michael and Kathy Beeman[1] appeal as of right from a judgment of no cause of action entered in favor of defendant Prakash Malkani, M.D. following a jury trial. Because the trial court did not abuse its discretion when it, denied plaintiffs' request to allow rebuttal evidence, instructed the jury, denied plaintiffs' motion for judgment notwithstanding the verdict and new trial, awarded defendant expert witness fees, and may or may not have provided the jury with medical enlargements it requested, we affirm.

I

[1] Kathy Beeman's cause of action alleges loss of society and companionship. Therefore, in the context of the medical malpractice claims when we refer to plaintiff in the singular, we reference Michael Beeman.

This claim arises out of an arteriogram and angioplasty that defendant performed on plaintiff in February 1997. Plaintiff had problems with his leg that progressed slowly since at least fall 1995. Plaintiff initially sought medical care from his primary care physician, Dr. Albito, for headaches and a feeling of numbness in his left leg. Plaintiff felt that, at times, his leg felt dead. Dr. Albito referred plaintiff to Dr. Reyes, a vascular surgeon. After examining plaintiff and reviewing the results of a Doppler study performed on plaintiff, Dr. Reyes reported diminished blood flow and recommended an arteriogram. The arteriogram was scheduled at St. Luke's Hospital for February 21, 1997. On the day of the arteriogram, St. Luke's provided plaintiff with a form entitled, "Radiology Department Information and Consent Form for Non-Cerebral Angiography, Angioplasty, Stent Placement, Thrombolytic Therapy and Embolization." Plaintiff signed and dated the consent form.

Defendant, an interventional radiologist, performed the arteriogram noting a totally occluded left common iliac artery. Following the diagnostic procedure, defendant spoke with Dr. Reyes, and then attempted to unblock plaintiff's occluded left common iliac artery through angioplasty and stent placement. Plaintiff then proceeded to the recovery room where he developed acute symptoms. An emergency situation developed when it was discovered that plaintiff suffered a ruptured artery and was losing blood. Dr. Reyes initially attempted to repair the lacerated artery but then performed emergency bypass surgery on plaintiff.

Plaintiff filed suit against defendant alleging that defendant negligently punctured an artery wall when he performed the angioplasty and stenting procedure causing a life-threatening emergency situation, without obtaining his informed consent. The matter proceeded to a jury trial. The jury rendered a verdict in favor of defendant specifically finding that defendant did not fail to obtain informed consent as required by the standard of care, and also that defendant did not breach the standard of care when he performed the angioplasty or stenting procedure on plaintiff. The trial court then denied plaintiffs' motion for judgment notwithstanding the verdict and for new trial but granted defendant's motion to tax costs and compel payment of defense expert deposition fees. Plaintiffs now appeal as of right.

II

Plaintiffs first argue that the trial court abused its discretion in failing to allow rebuttal evidence after defendant's expert raised, for the first time, new issues during defendant's evidence presentation. "The scope of rebuttal in civil cases is within the sound discretion of the trial court." *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 655; 517 NW2d 864 (1994). Hence we review a trial court's decision regarding rebuttal testimony for an abuse of discretion. *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Rebuttal evidence is evidence which explains, contradicts, or otherwise refutes an opponent's evidence. Its purpose is to undercut the opponent's case and not to merely confirm that of the proponent. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333, 348; 480 NW2d 623 (1991). "Accordingly, a plaintiff may not introduce during rebuttal new and independent facts competent as part of his testimony in chief unless permitted to do so by the court." *Id*. Generally, rebuttal evidence must relate to a substantive rather than a collateral

matter, and contradictory evidence is admissible only when it directly tends to disprove a witness's exact testimony. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994).

Plaintiffs argue that they should have been able to recall their expert witness, Dr. Sharma, in order to rebut defendant's expert, Dr. Vogelzang's, testimony that images taken at the conclusion of the angioplasty did not show a bleed but instead showed the ureter. But the record reveals that plaintiffs questioned Dr. Sharma at length regarding images of the angioplasty and what he believed they showed when he was on the witness stand. Dr. Sharma testified that in his opinion, the films taken at the conclusion of the angioplasty showed a bleed, and that the stents defendant put in place had not contained the bleeding. Plaintiffs had a full opportunity to question Dr. Sharma during their case in chief about the angioplasty films and in fact did so. The record clearly shows that recalling the witness was not to rebut new issues raised during defendant's evidence presentation but instead to again cover issues already previously discussed because Dr. Sharma specifically testified that the films showed a bleed. *Sullivan Industries, Inc, supra* at 348. The trial court did not abuse its discretion when it denied plaintiffs' request for rebuttal. *Winiemko, supra* at 418.

III

Plaintiffs next assert that the trial court abused its discretion in failing to allow jury instructions on the issues concerning the informed consent law at issue. In particular, plaintiffs argue that the jury instructions were insufficient because the trial court failed to advise the jury that even if informed consent was obtained to perform the arteriogram, that the consent did not extend to subsequent treatments such as the angioplasty defendant performed on plaintiff. Defendant responds that the trial court's instruction sufficiently advised the jury of the legal obligations required regarding informed consent and no error occurred.

On appeal, claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). This Court reviews a trial court's decision regarding special jury instructions for an abuse of discretion. *Chastain v General Motors Corp*, 254 Mich App 576, 590; 657 NW2d 804 (2002). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). There is no reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). A trial court's decision regarding supplemental instructions will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Grow v W A Thomas Co*, 236 Mich App 696, 702; 601 NW2d 426 (1999).

Model civil jury instructions, adopted by the Committee on Model Civil Jury Instructions appointed by our Supreme Court, are authorized by court rule. MCR 2.516(D). When a party so requests, a court must give a standard jury instruction if it is applicable and accurately states the law. *Chastain, supra* at 590-591, citing MCR 2.516(D)(2). But, "[w]hen the standard jury instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001); see also MCR 2.516(D)(3)-(4). Additional

instructions must be patterned in the style of the model instructions in a concise, understandable, conversational, unslanted, and nonargumentative manner. *Id*., citing MCR 2.516(D)(4).

The trial court instructed the jury using Model Civil Jury Instruction 30.02 stating as follows:

> Negligence may consist of the failure on the part of the radiologist to reasonably inform Michael Beeman of risk of hazard which may follow the treatment contemplated by the radiologist. By reasonably informed I mean that the information must have been given timely and in accordance with the accepted standards of practice among the members of the profession with similar training and experience in radiology.

A review of the record reveals that both plaintiffs' and defendant's experts provided testimony outlining the appropriate standard of practice among members of defendant's profession. The trial court's instructions directed the jury to review the evidence presented by the parties and determine whether defendant adequately informed plaintiff of the risk of hazard both in a timely manner and in accordance with the accepted standard of practice. Thus, the court's instruction adequately and fairly presented the applicable law to the jury. As such, the trial court's instruction was appropriate. No special or supplemental instruction was required and the trial court did not abuse its discretion. *Chastain, supra* at 590-591, citing MCR 2.516(D)(2).

IV

Plaintiffs next argue that the trial court abused its discretion when it denied plaintiffs' motion for JNOV and for a new trial. We review de novo a trial court's decision regarding a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for JNOV should be granted only when there is insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id*. at 123-124. If the evidence is such that reasonable jurors could disagree, JNOV is improper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

This Court reviews the trial court's denial of a motion for a new trial for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). In deciding whether to grant or deny a motion for a new trial on the ground that the jury's verdict is against the great weight of the evidence, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Id*. This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Id*. "This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*.

Plaintiffs argue specifically that when defendant discovered the severity of plaintiff's blockages during the arteriogram, that plaintiff was entitled as a matter of law to the opportunity to make an informed consent regarding which procedure he felt most appropriate either

angioplasty or bypass. Plaintiffs essentially argue that the new information gathered during the arteriogram obviated plaintiff's earlier consent, and defendant performed the angioplasty without consulting plaintiff and obtaining his informed consent. There is no doubt that in Michigan, a physician must obtain informed consent, i.e., must warn a patient of the risks and consequences of a medical procedure. *Wlosinski v Cohn*, 269 Mich App 303, 308; 713 NW2d 16 (2005). Further, under the doctrine of informed consent, patients have the right to make their own medical decisions. *In re AMB*, 248 Mich App 144, 199; 640 NW2d 262 (2001). In other words, the standard of care, as a matter of law, includes informed consent.

Like the previous issue, this issue boils down to a standard of care determination. It is the plaintiff's duty to establish the standard of care that he contends was breached. MCL 600.2912a(1). Further, a plaintiff has the duty to establish that "in light of the state of the art existing at the time," the physician "failed to provide the plaintiff the recognized standard of acceptable professional practice of care in the community." MCL 600.2912a(1). But, a defendant has a right to contest the specific standard of care the plaintiff advances. Ultimately, questions regarding the standard of care established by the proofs and compliance with the standard of care found are ones for the jury.[2]

Here, the record shows that after arriving at St. Luke's on the day of the procedure, which was scheduled in advance, a St. Luke's nurse provided plaintiff with a clearly labeled consent form. The consent form was entitled, "Radiology Department Information and Consent Form for Non-Cerebral Angiography, Angioplasty, Stent Placement, Thrombolytic Therapy and Embolization." The form consists of two full pages of explanation describing each of the procedures as well as associated risks. There is also a separate section on the form entitled "RISKS" which provides additional warnings. Handwritten on the form near the heading "PROCEDURE:" is "possible angioplasty, . . . stent." Plaintiff signed and dated the consent form agreeing that he read and understood the instruction on the form. Plaintiff testified at trial that he read the form and that he was aware that the form indicates that very rarely a vessel being dilated can rupture. Plaintiff also testified that he spoke with the nurse about the procedure. Plaintiff also indicated that he had a preoperative discussion with defendant. Plaintiff admitted at trial that he did not ask any questions of either defendant, or the nurse, about the risk of rupture.

Like the previous issue, plaintiffs stress in their brief on appeal that, as a matter of law, defendant was required to provide plaintiff with the new information discovered during the arteriogram before proceeding with the angioplasty and stenting procedure. However, plaintiffs provide no persuasive or binding authority[3] directing that this argument regarding standard of

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[2] See M Civ JI 30.01: "It is for you to decide . . . what the ordinary [physician] of ordinary learning, judgment or skill would do or not do under the same or similar circumstances."

[3] Plaintiffs rely heavily on an unpublished decision of this Court entitled *Cornelius v. Joseph*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2003 (Docket No. 237956). Although we are not bound to, we have reviewed *Cornelius* and find that it provides no guidance in this matter because it is factually distinguishable. The *Cornelius* decision is a "course of treatment case" and involves a series of sclerotherapy treatments. In that case, this

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care is somehow a question of law rather than a question to be determined by the jury. In the trial court below, plaintiffs argued their position before the jury as potential malpractice. Both parties provided evidence relating to the consent form, preoperative discussions with plaintiff, and defendant's decision to proceed with the angioplasty and stent procedure while plaintiff was still sedated from the arteriogram. Both plaintiffs' and defendant's experts provided testimony regarding the appropriate standard of practice among members of defendant's profession. Clearly, the parties hotly contested the standard of care issue—whether it be establishing the standard or complying with it—at trial. There is no question that the parties presented sufficient evidence to create an issue for the jury regarding standard of care and the trial court properly denied plaintiffs' request for a JNOV. *Merkur Steel Supply, Inc, supra.* And further, the trial court did not err when it denied plaintiffs' motion for a new trial on the ground that the jury's verdict was not against the great weight of the evidence. *Campbell, supra*.

V

Plaintiffs also argue that the trial court abused its discretion in awarding defendant an excessive amount for its expert fees. Plaintiffs specifically argue that defendant did not provide "any evidence" in support of the expert fees it requested in order for the trial court to make an informed assessment regarding costs. This Court reviews an award of costs for an abuse of discretion. *Badiee v Brighton Area Schools*, 265 Mich App 343, 377; 695 NW2d 521 (2005).

Defendant requested costs as the prevailing party under MCR 2.625 and specifically requested the taxation of his expert witness fees pursuant to MCL 600.2164 in the amount of $25,596.50. Plaintiffs opposed defendant's motion and the trial court entertained oral argument on the matter. The trial court took the arguments under advisement and then later awarded defendant expert fees in the amount of $22,900 without elaborating.

"An expert is not automatically entitled to compensation for all services rendered. The burden of proving fees rests upon the claimant of those fees." *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 269 Mich App 25, 107; 709 NW2d 174 (2005) (internal quotations and citations omitted). Experts are "properly compensated for court time and the time required to prepare for their testimony as experts." *Id*., at 107-108 citing *Detroit v Lufran Co*, 159 Mich App. 62, 67; 406 NW2d 235 (1987). Further, "conferences with

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Court found as follows:

> Where, as here, there is a course of treatment, we do not believe that the failure to obtain a patient's informed consent before the initial treatment eliminates the need for obtaining the patients' informed consent before subsequent treatments. Thus, we believe that if defendant Joseph never obtained plaintiff Barbara Cornelius's informed consent, a separate accrual date would result from each treatment undertaken.

The present case is factually distinguishable because no "course of treatment" is involved. Plaintiff explicitly consented to undergoing an arteriogram with possible angioplasty and stenting on February 21, 1997. This was not a treatment that plaintiff would undergo over more than one visit. The *Cornelius* reasoning does not apply.

counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position" are not properly compensable as expert witness fees. *Id*.

A review of the record reveals that in support of his request for attorney fees, defendant provided several invoices charged and submitted by three experts: Robert Vogelzang, M.D., an interventional radiology expert, totaling $15,512.50; Krishna Jain, M.D., a vascular surgery expert, totaling $8,734; and William Romanow, M.D., an interventional radiology expert, totaling, $1,350. All of the invoices are dated, itemized, and provide specific descriptions of the sort, and extent, of work performed. We note that only Dr. Vogelzang and Dr. Jain testified at trial. When asked what his standard per hour rate for testimony, Dr. Vogelzang testified that his rate was $450 per hour. Counsel did not ask Dr. Jain his rate during trial.

In light of this record, we cannot conclude that the trial court abused its discretion. *Badiee, supra.* Defendant provided the trial court with ample evidence from which to assess the reasonableness of his requested expert witness fees. Although the trial court did not specifically state as much, it is clear from the record that the trial court attempted to separate the taxable costs from the nontaxable costs. The trial court's award in the amount of $22,900 was $2,696 less than defendant's requested amount of $25,596. Among other reductions, presumably, the trial court separated out the $1,350 fee charged by Dr. Romanow who did not testify at trial. Plainly, the trial court did not merely accept defendant's characterization of the expert witnesses' fees, determined that some of the fees were nontaxable expenses that could not be justified and, consequently, reduced the fee award accordingly.

Plaintiffs have not established that the trial court failed to independently evaluate the fees to determine whether they were reasonable or properly designated. *Michigan Citizens, supra* at 106. In other words, plaintiffs have not established an error that is "so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion," and we therefore conclude that the trial court did not abuse its discretion when it awarded defendant expert witness fees in the amount of $22,900. *Churchman, supra* at 233.

VI

Finally, plaintiffs argue that the trial court abused its discretion when it failed to provide all of the medical evidence to the jury when the jury requested the "medical charts." On the last day of trial, just after the trial court polled the jury, plaintiffs' trial counsel stated that it needed to make a record. Then the following exchange occurred:

> *Plaintiffs' counsel:* There was – there was a note that was sent out originally by the jury and they asked for the – the consent forms and the chart. And we sent in medical records and I specifically pointed to Exhibit Numbers 18A, 18B, 19, 20 and the Court was not here. I had specifically indicated to the law clerk that these were part of the chart, they were enlargements. I guess technically Exhibit 20 was not. But the rest of these were because they were the records and we did provide them with all the other medical records with the exception of the films. And these did not go in, notwithstanding my instructions.

The Court: Did the charts go in?

Defense counsel: Yes.

Plaintiffs' counsel The charts went in.

The Court: Well, all I can say it's a consent form, patient chart. For the record, the enlargements didn't go in and they were requested but – by counsel to go in with the chart and they didn't go in, but that's – if it's error, it's error and it's preserved.

Defense counsel: Just for the record, Your Honor, if I may, Exhibit 20 is not part of the chart, it's a demonstrative exhibit and I think he agreed.

The Court: The other two are the issues, the blowup and the chart are the issue.

Defense counsel: The – Exhibit 4, Exhibit 64 and Exhibit 63 are all contained – these are blowups on – Styrofoam blowups of what is already in the chart. In other words, the jury received these blowup exhibits as smaller exhibits within the chart so there is no prejudice.

The Court: Whatever. If there is or isn't that will have to be decided on another date. It's clear what happened here.

Plaintiffs' counsel Just one last thing to describe this for the record. The Exhibit 19 is, I do not believe, at all in the information that they received.

Exhibit Number 18B has highlighting where witnesses when they were questioned – and so was 18A has highlighting and checkmarks on it that came out during the testimony. So there is a difference between what they received, and just that's my take on it.

Defense counsel: And I want to make a correction, Your Honor. I agree that Deposition Exhibit 4, it says CM3701, is a blowup that is not part of the chart. So they didn't request Exhibit 4 as they also did not request – the jury also did not request Exhibit 20. And it is Exhibits 18B and 19 – 18A and 18B – let me restate that – it's exhibits 18A and 18B that are also contained in the chart that they received.

The Court: I think we've got that straight. We preserved the issue. Have a good day.

Plaintiffs' counsel: Thank you, Your Honor.

This exchange contains the entirety of the record that we have regarding what happened in the trial court in regard to the alleged missing medical evidence.

Essentially, plaintiffs' entire argument consists only of the following assertion: "[b]ased upon the fact that the trial court was unable to articulate any rational [sic] for the decision of its staff to exclude certain documents, despite the fact that those documents were previously brought to its attention, from the documents submitted to the jury constitutes an abuse of discretion." At the outset, we point out that this Court will not undertake to support a party's position for it. *Wysocki v Kivi*, 248 Mich App 346, 360; 639 NW2d 572 (2001).[4]

Nevertheless, we have reviewed this issue, and from this record we are not clear on exactly what occurred. It is totally unclear from this record whether any exhibits were in fact missing and if so, if those exhibits represented enlargements. If they were in fact enlargements, then we must point out the enlargements themselves are not the "evidence," and it does appear that the actual "medical charts" were furnished to the jury. Thus, any enlargements would be merely duplicative. Neither party provided copies of the exhibits for this Court's review, although, from the context, we gather that these exhibits were relevant to the alleged malpractice, and most likely included enlargements of portions of the medical records that were discussed in depth during trial. Even if we are to assume that all of the exhibits plaintiffs point to were not provided to the jury, despite its request, it is impossible to determine if withholding these exhibits from the jury negatively affected the verdict. See eg. *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 684-685; 630 NW2d 356 (2001). On this record, we find no error.

Affirmed.

/s/ Karen Fort Hood
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

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[4] Defendant attached additional evidence to his appellate brief, namely, an affidavit of the trial court's bailiff, Amy Patterson. In it, Patterson avers that she took exhibits numbered 18A, 18B, and 19 into the jury room with the medical charts. Because it is well established that a party may not enlarge the record on appeal, we have not considered this evidence in our decision on this issue. *Kent Co Aeronautic Bd v Dep't of State Police*, 239 Mich App 563, 579-580; 609 NW2d 593 (2000).